

At the preliminary hearing claimant's attorney requested that claimant be referred to an appropriate specialist in order to evaluate "if he is having problems due to exposure to asbestos or dust or some work-related condition with his lungs." The only medical evidence presented verifies that claimant was diagnosed with tuberculosis on October 10,

1995. In November 1995 claimant began experiencing breathing problems and fatigue. Claimant acknowledged that the INH treatments provided for the tuberculosis caused him to have fatigue and other symptoms including headaches. There was no medical evidence presented to show that claimant suffered from any asbestos-related condition or any work-related injury of any kind.

K.S.A. 44-501 and K.S.A. 44-508 make it the claimant's responsibility to prove that claimant's position on an issue is more probably true than not based upon the entire record. This burden of proof must be established by a preponderance of the credible evidence. See Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). K.S.A. 44-501(a) further requires that, in order to be compensable, personal injury must result from an accident arising out of and in the course of claimant's employment. Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. See Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

The Administrative Law Judge found claimant had provided notice of his injury. This issue was not appealed to the Appeals Board and that finding will not be disturbed.

The Administrative Law Judge also found the claim to be compensable. That issue is before the Appeals Board. In order for a claim to be compensable the claimant must show by a preponderance of the credible evidence that the condition suffered did arise out of and in the course of his employment with respondent. This evidence is not in the record. The only medical evidence in the record shows claimant to have a positive tuberculosis test in October 1995 with appropriate treatment thereafter. There is no indication from any medical source that claimant suffers from any other lung condition in any way related to his employment with respondent. Absent some evidence of a work-related condition, the claimant's fishing expedition requesting an evaluation to determine if he is having problems due to some work-related exposure is not appropriate justification for referring claimant for an independent medical examination at respondent's expense.

For preliminary hearing purposes the Appeals Board finds there is no evidence to show claimant is currently suffering from any work-related injury which arises out of and in the course of his employment with the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 1, 1996, should be, and is hereby, reversed and claimant is denied benefits at this time.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Vincent A. Burnett, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge

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Philip S. Harness, Director